grantor consequently holds a new estate by purchase.[12] Nor does a positive intention to break the descent affect this result,[13] for at most the transfer is an exercise of the undoubted right to disinherit. Indeed, in the recent case of *Dudrow* v. *King* (Md. 1912) 83 Atl. 34, the element of intention was deemed controlling. The intestate aliened for a collateral purpose upon trust to reconvey, expressing his intention not to change the succession and the court held, in view of the grantor's desire, that the descent had not been broken by the excursion of the legal title. This decision shows an encouraging tendency to disregard a strictly technical rule of property in order to effectuate the intention of the intestate and to allow the fullest freedom in the management of the title.

CLOG ON THE RIGHT TO REDEEM.—The court of chancery, asserting a paternal solicitude for the embarrassed borrower,[1] has imposed upon every transaction in which security is given for the payment of a debt, a continuing right to redeem upon payment of principal, interest and costs.[2] This right has become a necessary incident of the mortgage relationship,[3] so that those who enter into that relationship can no more bargain it away[4] than men who contract could agree to dispense with a consideration. There can be no valid promise that the *res* shall be indefeasibly the property of the mortgagee, either if the mortgagor fail to pay on the law day[5] or if he fail to pay within an agreed time thereafter.[6] The first promise would kill and the second would cripple the equity of redemption in the very instrument which gave it birth.[7] Whatever one may think of this bold interference of equity with the legal consequences of the mortgagor's deliberate deed,[8] it is clear that if equity was justified in

[12]Holme *v.* Shinn (1901) 62 N. J. Eq. 1; but see Hargrave & Butler *supra.* The conclusion would seem to be supported further by the well-settled proposition that when one inherits the equitable estate and subsequently buys in the legal title he holds by purchase. Goodright *v.* Wells (1781) Doug. 771; Selby *v.* Alston (1797) 3 Ves. Jr. 338; Olmstead *v.* Douglass (1898) 16 Oh. Cir. Ct. 171; *cf.* Doe d. Harmon *v.* Morgan (1797) 7 D. & E. 103; *contra,* Frick *v.* Laughead (1902) 203 Pa. St. 168.

[13]Nesbitt *v.* Trindle (1878) 64 Ind. 183; see Kihlken *v.* Kihlken (1898) 59 Oh. St. 106.

[1]Vernon *v.* Bethell (1761) 2 Eden 113; 2 Story, Eq. Jur. (13th ed.) § 1012.

[2]Jennings *v.* Ward (1705) 2 Vern. 520.

[3]Henry *v.* Davis (1823) 7 Johns. Ch. 40.

[4]Samuel *v.* Jarrah Corp. L. R. [1904] A. C. 323.

[5]Jackson *v.* Lynch (1889) 129 Ill. 72; Rogan *v.* Walker (1853) 1 Wis. 527.

[6]Heirs of Samuel Stover *v.* Heirs of William Bounds (1853) 1 Oh. St. 107; see Toomes *v.* Conset (1745) 3 Atk. 261.

[7]It was an equally invalid restriction to limit the right to redeem to the mortgagor himself, Salt *v.* Marquess of Northampton, L. R. [1892] A. C. 1, or to a particular class of persons, as heirs of the mortgagor's body. Howard *v.* Harris (1683) 1 Vern. 190. If, however, the court sees a proper motive for such restriction, it will be supported. Bonham *v.* Newcomb (1683) 1 Vern. 232.

[8]See Salt *v.* Marquess of Northampton *supra;* Samuel *v.* Jarrah Corp. *supra; cf.* 4 Kent, Comm. (4th ed.) 158.

creating the equity of redemption, she is justified in seeing that her child should not be still-born.[9]

The question next arises whether a mortgagor is free to put the day of legal payment at a distant date and in so far make the mortgage irredeemable.[10] There should be no objection to such a stipulation; since, until the law day arrives, there is no right in equity to redeem and therefore nothing for chancery to protect. No exception seems to have been taken to long-term mortgages in this country;[11] but the late cases in England continue their antiquated attitude of hostility,[12] as a recent decision of the Privy Council, *Fairclough* v. *Swan Brewery Co.*, L. R. (1912) A. C. 565, strikingly exemplifies[13] under a novel state of facts. A mortgagor mortgaged his leasehold interest so that the debt was not wholly due until the eve of the expiration of the lease. The court allowed him to pay and redeem before the appointed time on the theory that he had clogged the equity of redemption by postponing his right to redeem until redemption would be worthless. Such a conclusion was not necessary in order to be loyal to the equitable theory of redemption and it seems to be a further and unnecessary interference with freedom of contract.

A further point raised in the case suggests that equity's solicitude was not exhausted in securing to the mortgagor the unclogged right to redeem. Chancery insisted that redemption would be meaningless unless it returned to the redemptioner his unclogged property, free from any further hold upon it by the mortgagee.[14] An instance would be presented where a mortgagor of land, in addition to his promise to pay off a loan in five years, binds the land with a covenant to pay the mortgagee one-half of that land's rents and profits for ten years. In such a case, the collateral covenant is enforceable only for the period of the security.[15] It is not, however, essential that the promise be one which would give to the mortgagee a right of action against the property itself;[16] for the courts in sweeping language ruled that if a mortgagor, after redemption, merely find himself "enveloped in an atmosphere of danger" as to his use and enjoyment of the *res*, he may disaffirm the promises that brought about his hampered situation.[17]

It is probably the law to-day that a collateral stipulation not af-

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[9]An agreement to extinguish an equity of redemption entered into subsequently to and independently of the mortgage transaction will be upheld if *bona fide* and fair. Wynkoop *v.* Cowing (1859) 21 Ill. 570; *cf.* Villa *v.* Rodriguez (1870) 12 Wall. 323.

[10]Abbe *v.* Goodwin (1829) 7 Conn. 377; *cf.* Talbot *v.* Braddill (1683) 1 Vern. 183.

[11]See Gray, Perp. (2nd ed.) § 570.

[12]Talbot *v.* Braddill *supra;* Cowdry *v.* Day (1859) 1 Giff. 316.

[13]Morgan *v.* Jeffreys, L. R. [1910] 1 Ch. 620. It seems doubtful whether there is any rule at all against clogging in mortgages of debenture shares. DeBeers etc. *v.* British South African Co., L. R. [1912] A. C. 52.

[14]Noakes & Co. *v.* Rice, L. R. [1902] A. C. 24; Browne *v.* Ryan (1901) 2 Ir. R. 653.

[15]Noakes & Co. *v.* Rice *supra;* Bradley *v.* Carritt, L. R. [1903] A. C. 253.

[16]Browne *v.* Ryan *supra,* 684.

[17]Bradley *v.* Carritt *supra.*

fecting the mortgagor as owner of the *res* cannot be impugned at all,[18] and that a stipulation which does affect the *res* will at least be enforced for the period of the security.[19] Such stipulations appear invulnerable to attack as being clogs upon redemption. It was long the habit of the courts to condemn every collateral promise which inured to the benefit of the mortgagee as necessarily a clog[20] or as unconscionable *per se*.[21] Where usury laws are in force such stipulations are regarded as devices to cloak disobedience of the statute;[22] but the refreshing modern tendency,[23] at least where usury has been abolished,[24] is to uphold any provision which does not clog the equity of redemption as delimited above,[25] nor in fact involve that unconscionable conduct against whose machinations equity should always and everywhere relieve.[26] Such a conclusion is eminently satisfactory. If the law is fluid enough to adapt itself to changing social conditions, it should find a difference between a seventeenth century "impecunious land owner in the toils of a money lender"[27] and a modern business man seeking with eyes wide open to secure a loan on those conditions which he deems most advantageous to himself.

KNOWLEDGE AS AN ELEMENT OF ASSUMPTION OF RISK.—One of the fundamental principles of the law of torts is that one who knowingly assents to an injury cannot complain of the damage resulting to himself. This rule has most frequently found expression in the maxim *volenti non fit injuria* and the phrase "assumption of risk." The latter is commonly used in cases involving the relation of master and servant and, by the weight of authority, is conceived of as an implied term of the contract of employment,[1] the servant agreeing to assume the risk

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[18]Clawson *v.* Munson (1870) 55 Ill. 394; and see Bradley *v.* Carritt *supra.*

[19]Biggs *v.* Hoddinott, L. R. [1898] 2 Ch. 307.

[20]See Jennings *v.* Ward *supra;* Broad *v.* Selfe (1863) 9 Jur. N. S. 885.

[21]*In re* Edwards' Estate (1860) 11 Ir. Ch. R. 367; Barrett *v.* Hartley (1866) L. R. 2 Eq. Cas. 789; Broad *v.* Selfe *supra.*

[22]Uhlfelder & Co. *v.* Carter's Adm'r. (1879) 64 Ala. 527; see Tholen *v.* Duffy (1871) 7 Kan. 405.

[23]Browne *v.* Ryan *supra,* 678 *et seq;* Buchanan *v.* Harvey [1904] 3 N. B. Eq. 61; and see Potter *v.* Edwards (1857) 26 L. J. Ch. 468.

[24]13 Harv. L. Rev. 595; 1 Coote, Mortgages (7th ed.) 13.

[25]Mainland *v.* Upjohn (1888) L. R. 41 Ch. Div. 126; Potter *v.* Edwards *supra;* Biggs *v.* Hoddinott *supra.*

[26]James *v.* Kerr (1889) L. R. 40 Ch. Div. 449; see Biggs *v.* Hoddinott *supra.*

[27]Samuel *v.* Jarrah Corp. *supra,* 327.

[1]Narramore *v.* Ry. Co. (1899) 96 Fed. 298; I. C. Ry. Co. *v.* Fitzpatrick (1907) 227 Ill. 478; Brown *v.* Rome Co. (1908) 5 Ga. App. 142; Yarmouth *v.* France (1887) L. R. 19 Q. B. D. 647; *contra,* Rase *v.* Ry. Co. (1909) 107 Minn. 260. The conflict of authority arises where assumption of risk is pleaded as a defense to an action founded upon the violation of a statutory duty. The view that assumption is purely contractual in its nature necessitates the rejection of this plea, since otherwise the servant would be allowed to contract his master out of the statute. Narramore *v.* Ry. Co. *supra;* Davis Coal Co. *v.* Polland (1902) 158 Ind. 607. But where the doctrine is based on the maxim *volenti non fit injuria,* its availability